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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOYCE MARIE SIMMONS,
Plaintiff,
v.
KIMBERLY LUKE, et al.,
Defendants.

Case No. [19-cv-00139-VKD](#)

**ORDER SCREENING COMPLAINT
PURSUANT TO 28 U.S.C. § 1915A(A)**

Pro se plaintiff Joyce Marie Simmons, a federal prisoner, filed this civil rights action under *Bivens v. Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against prison officials at the Federal Correctional Institution in Dublin, California (“FCI-Dublin”) for allegedly violating her constitutional rights. Dkt. No. 1.

I. STANDARD OF REVIEW

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988); *Jackson v. Carey*, 535 F.3d 750, 757 (9th Cir. 2003).

The case of *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971), “established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any

1 statute conferring such a right.” *Carlson v. Green*, 446 U.S. 14, 18 (1980). The Supreme Court
2 has recognized a *Bivens* claim in only three cases: *Bivens* (Fourth Amendment unreasonable
3 search and seizure); *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (Fifth Amendment Due
4 Process Clause gender discrimination); and *Carlson v. Green*, 446 U.S. 14, 17–19 (1980) (Eighth
5 Amendment inadequate medical treatment). “These three cases—*Bivens*, *Davis*, and *Carlson*—
6 represent the only instances in which the [Supreme] Court has approved of an implied damages
7 remedy under the Constitution itself.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017). The
8 Supreme Court has made clear that “expanding the *Bivens* remedy is now a ‘disfavored’ judicial
9 activity,” and such a remedy will not be available if there are “‘special factors’ counseling
10 hesitation in the absence of affirmative action by Congress.” *Id.* at 1848 (citation omitted).

11 The only relief available in a *Bivens* action is an award of money damages for injuries
12 caused by a defendant acting in his or her individual capacity. *Ministerio Roca Solida v.*
13 *McKelvey*, 820 F.3d 1090, 1093–96 (9th Cir. 2016). A federal court lacks subject matter
14 jurisdiction over a *Bivens* suit that seeks only equitable relief. *Id.* at 1095 (citing *Consejo de*
15 *Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1173 (9th Cir. 2007)).

16 II. DISCUSSION

17 Ms. Simmons is incarcerated at FCI-Dublin where the events underlying this action arose.
18 Ms. Simmons claims that during the week of September 22, 2017, defendant Unit Manager
19 Kimberly Luke approved and issued to her a “khaki” jumper dress even though Ms. Simmons was
20 housed at the “blue uniform camp.” Dkt. No. 1 at 5. Ms. Simmons claims that Ms. Luke was
21 fully aware that the color of the uniform identifies the inmates with the facility in which they are
22 housed. *Id.* at 6. Specifically, the “khaki color uniform is for the low-level inmates [convicted] of
23 various violent crimes, housed at the enclosed facility, surrounded by barbwire fence, which is
24 adjacent to the satellite prison camp, which has the designated color blue.” *Id.*

25 Ms. Simmons first became aware of a risk to her safety on October 4, 2017, when
26 defendants Mr. Hilliard¹ and Correctional Officer Ashley Phillips confronted her about wearing

28 ¹ Mr. Hilliard’s first name is not given in the complaint. See Dkt. No. 1 at 3.

1 the khaki jumper dress. *Id.* at 7. Ms. Simmons was asked if she had a memo to wear the khaki
2 jumper dress, as no memo had been issued or left in the officer's station by Ms. Luke. *Id.* Ms.
3 Simmons alleges that Mr. Hilliard "was so close to my face yelling that moisture from his mouth
4 went into my face." *Id.* Ms. Simmons claims she was traumatized by the encounter, as she was
5 rendered "completely breathless, speechless, numb, shocked, hurt, terrified, humiliated, and
6 almost reduced to tears." *Id.* Ms. Simmons says she was not argumentative or confrontational and
7 did not act in a disorderly manner. *Id.* The very next day, another officer informed Ms. Simmons
8 that if she had gone outside with the khaki jumper dress, perimeter officers could have fired on her
9 thinking she was attempting to escape. *Id.* Ms. Simmons claims that her "entire body was
10 overwhelmed with fear for [her] safety, well-being and life." *Id.* Ms. Simmons claims Ms. Luke
11 knew when she provided the khaki jumper dress to Ms. Simmons that wearing it would subject
12 Ms. Simmons to a substantial risk of harm, and Ms. Luke was deliberately indifferent to that risk.
13 *Id.* at 6. Ms. Simmons claims she sustained the following injuries due to defendants' unlawful
14 conduct: "[h]umiliation, embarrassment, shock/terrified, and mental suffering." *Id.* at 9. Ms.
15 Simmons seeks "actual damages and/or punitive damages" for Ms. Luke's violation of her Eighth
16 Amendment right to safety. *Id.* at 9; *see Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

17 Liberally construed, the complaint states a viable Eighth Amendment claim under *Ziglar*
18 against Ms. Luke. There is a question whether Ms. Simmons may proceed with her claim if she
19 seeks redress solely for mental and emotional injury in view of 42 U.S.C. § 1997e(e), which states
20 that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other
21 correctional facility, for mental or emotional injury suffered while in custody without a prior
22 showing of physical injury or the commission of a sexual act." However, the question of whether
23 section 1997e(e) applies to claims involving constitutional violations without an accompanying
24 physical injury has not been resolved in the Ninth Circuit, and there is a split among the Courts of
25 Appeals in other circuits. *See Aref v. Lynch*, 833 F.3d 242, 262–65 (D.C. Cir. 2016) (discussing
26 circuit split). Ms. Simmons does not plead physical injury. The Court will not dismiss her claim
27 against Ms. Luke on this basis at this stage of the case. However, if she wishes, Ms. Simmons
28 may amend her complaint to allege physical injury if she can do so in good faith, or she may

1 amend her demand for a different form of relief, i.e., other compensatory damages, nominal
2 damages, or punitive damages, for the Eighth Amendment violation.

3 With respect to the claims against Officer Phillips and Mr. Hilliard, Ms. Simmons's
4 allegations regarding their verbal confrontation with her fail to state a claim on which relief may
5 be granted, because verbal harassment and abuse are not cognizable violations of any right secured
6 by the Constitution. *See Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) *overruled in part*
7 *on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008); *Rutledge v. Arizona*
8 *Bd. of Regents*, 660 F.2d 1345, 1353 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S.
9 719 (1983); *see, e.g., Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135 F.3d 1318
10 (9th Cir. 1998) (disrespectful and assaultive comments by prison guard not enough to implicate
11 Eighth Amendment). Accordingly, the claim against Officer Phillips and Mr. Hilliard does not
12 state a claim for relief. In the interest of justice, Ms. Simmons shall be granted leave to amend to
13 attempt to state a cognizable claim against these defendants.

14 Ms. Simmons also names Associate Warden Tamara Mischel as a defendant in this action,
15 alleging that Associate Warden Mischel was the acting warden at the time and authorized or
16 approved the khaki jumper dress. Dkt. No. 1 at 2. “Government officials may not be held liable
17 for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*.”
18 *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). A plaintiff must plead that an individual defendant,
19 through his or her own conduct, has violated the constitution. *Id.* at 676–77 (rejecting theory of
20 “supervisory liability” premised on an official’s knowledge of and acquiescence in his
21 subordinate’s unconstitutional conduct). Here, Ms. Simmons makes only cursory allegations
22 against Associate Warden Mischel, and it is not clear from the complaint whether she contends
23 that Associate Warden Mischel engaged in any personal misconduct. Dkt. No. 1 at 5–8. In the
24 interest of justice, Ms. Simmons shall be granted leave to file an amended complaint to attempt to
25 state facts sufficient to support a claim against Associate Warden Mischel.

26 **IV. CONCLUSION**

27 For the foregoing reasons, after screening the complaint pursuant to 28 U.S.C. § 1915A,
28 the Court finds that the complaint as pled fails to state a claim as to all defendants. Ms. Simmons

1 may file an amended complaint to attempt to correct the deficiencies discussed above by no later
2 than **May 31, 2019**. The amended complaint must include the caption and civil case number used
3 in this order, Case No. C 19-00139 VKD (PR), and the words “AMENDED COMPLAINT” on
4 the first page. If using the court form complaint, Ms. Simmons must answer all the questions on
5 the form in order for the action to proceed.

6 Ms. Simmons is advised that the amended complaint will supersede the original complaint,
7 the latter being treated thereafter as non-existent. *Ramirez v. Cty. of San Bernardino*, 806 F.3d
8 1002, 1008 (9th Cir. 2015). Consequently, claims not included in an amended complaint are no
9 longer claims and defendants not named in an amended complaint are no longer defendants. *See*
10 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

11 If Ms. Simmons fails to file an amended complaint by May 31, 2019, or the amended
12 complaint fails to cure all defects described above, the Court will issue an order reassigning the
13 case to a district judge with a recommendation that the complaint be dismissed in part for the
14 reasons described above.

15 The Clerk of the Court shall include two copies of the Court’s form complaint with a copy
16 of this order to Ms. Simmons.

17 **IT IS SO ORDERED.**

18 Dated: May 3, 2019

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VIRGINIA K. DEMARCHI
United States Magistrate Judge